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SIX CONTINENTS HOTELS, INC.

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

LAURA MCCABE and LATROYA  
SIMPSON, individually and on behalf  
of similarly situated individuals,

Plaintiffs,

v.

SIX CONTINENTS HOTELS, INC.;  
and DOES 2 through 10, inclusive,

Defendants.

CASE NO. C12-4818-NC

**DEFENDANT'S ANSWER TO  
PLAINTIFFS' THIRD AMENDED  
COMPLAINT**

Complaint Filed:	July 8, 2012
FAC Filed:	July 19, 2012
SAC Filed:	Oct. 11, 2013
TAC Filed:	June 30, 2015
Trial Date:	None

1 Defendant SIX CONTINENTS HOTELS, INC. (“Defendant” or “Six  
2 Continents”), by and through its attorneys, hereby answers the Third Amended  
3 Class Action Complaint (“TAC”) filed by Plaintiffs LAURA McCABE and  
4 LATROYA SIMPSON, and CHRISTY SARABIA (“Plaintiffs”) as follows:

5 **I. INTRODUCTION**

6 1. Defendant admits that it answers telephone calls at call centers located  
7 in Salt Lake City, Utah; Charleston, South Carolina; Gurgaon, India; Baguio,  
8 Philippines; Manila, Philippines; and Birmingham, England (collectively, the  
9 “English-Speaking Call Centers”) and that certain telephone calls made to the  
10 English-Speaking Call Centers are recorded for quality assurance purposes.

11 Defendant further admits that, prior to July 18, 2012, calls made to U.S. toll free  
12 numbers received an automated warning that calls may be monitored or recorded  
13 only if answered by the Birmingham, England call center. Except as expressly  
14 admitted, Defendant denies the allegations contained in Paragraph 1 of the TAC.

15 2. Defendant admits that 1-888-HOLIDAY, a toll-free reservation  
16 number for Holiday Inn hotels, is owned by Defendant. Defendant also admits that  
17 1-888-HOLIDAY can connect callers with the English-Speaking Call Centers.  
18 Defendant further admits that 1-888-211-9871, a toll-free reservation number for  
19 Priority Club Rewards members, is owned by Defendant. Defendant also admits  
20 that 1-888-211-9871 can connect callers with the English-Speaking Call Centers.  
21 Defendant also admits that it owns other toll-free reservation numbers, related to its  
22 other hotel brands, including, Holiday Inn Express, Crown Plaza Hotels and  
23 Resorts, InterContinental Hotels and Resorts, Staybridge Suites Hotels,  
24 Candlewood Suites Hotels and Hotel Indigo, which can connect callers with the  
25 English-Speaking Call Centers. Except as expressly admitted, Defendant denies the  
26 allegations contained in Paragraph 2 of the TAC.

1           3. Defendant admits that certain calls made to Defendant's telephone  
2 numbers were recorded for quality assurance purposes. Except as so admitted,  
3 Defendant denies the allegations contained in Paragraph 3 of the TAC.

4           4. Defendant denies the allegations contained Paragraph 4 of the TAC.

5           5. Defendant denies the allegations contained Paragraph 5 of the TAC

6 **II. THE PARTIES**

7           6. Defendant lacks sufficient knowledge or information to admit or deny  
8 the allegations contained in Paragraph 6 of the TAC and, on that basis, denies the  
9 allegations.

10          7. Defendant admits that Six Continents Hotels, Inc. is a corporation  
11 headquartered in Atlanta, Georgia and does business in California. Except as  
12 expressly admitted, Defendant denies the remaining allegations contained  
13 paragraph 7 of the TAC.

14 **III. JURISDICTION**

15          8. Defendant admits that this Court has subject matter jurisdiction over  
16 this action. Except as expressly admitted, Defendant denies the remaining  
17 allegations contained paragraph 8 of the TAC.

18          9. Defendant admits that this Court has personal jurisdiction over the  
19 parties. Except as expressly admitted, Defendant denies the allegations contained  
20 in paragraph 9 of the TAC.

21 **IV. FACTUAL ALLEGATIONS COMMON TO THE CLASS**

22          10. Defendant admits that Defendant owns the Holiday Inn, Holiday Inn  
23 Express, Crown Plaza Hotels and Resorts, InterContinental Hotels and Resorts,  
24 Staybridge Suites Hotels, Candlewood Suites Hotel, and Hotel Indigo hotel brands.  
25 Except as expressly admitted, Defendant denies the remaining allegations contained  
26 in Paragraph 10 of the TAC.

27          11. Defendant admits that certain toll-free reservation telephone numbers  
28 associated with its hotel brands may, in certain circumstances, connect callers to the

1 English-Speaking Call Centers operated by Defendant. Except as expressly  
2 admitted, Defendant denies the remaining allegations contained in Paragraph 11 of  
3 the TAC.

4 12. Defendant admits that its English-Speaking Call Centers receive  
5 incoming calls from persons, including certain persons from California. Except as  
6 expressly admitted, Defendant denies the remaining allegations contained in  
7 Paragraph 12 of the TAC.

8 13. Defendant admits that it records certain incoming calls for quality  
9 assurance purposes. Except as expressly admitted, Defendant denies the remaining  
10 allegations contained in Paragraph 13 of the TAC.

11 14. Defendant admits that certain calls from Plaintiff McCabe during the  
12 relevant time period were answered by Defendant's call centers in the Philippines  
13 and recorded. Except as expressly admitted, Defendant denies the remaining  
14 allegations contained in Paragraph 14 of the TAC.

15 15. Defendant admits that one call from Plaintiff Latroya Simpson during  
16 the relevant time period was answered by one of Defendant's call centers in the  
17 Philippines. Except as expressly admitted, Defendant denies the remaining  
18 allegations contained paragraph 15 of the TAC.

19 16. Defendant admits that one call from Plaintiff Christy Sarabia during  
20 the relevant time period was answered by one of Defendant's call centers. Except  
21 as expressly admitted, Defendant denies the remaining allegations contained  
22 paragraph 16 of the TAC.

23 17. Defendant admits that it did not have an automated notice of recording  
24 in place when Plaintiffs' calls were answered in its call centers. Except as  
25 expressly admitted, Defendant denies the remaining allegations contained  
26 paragraph 17 of the TAC.

27 18. Defendant denies the allegations contained in Paragraph 18 of the  
28 TAC.

1     **V.     CLASS ACTION ALLEGATIONS**

2             19.     Defendant admits that Plaintiffs purport to bring this action as a  
3     putative class action. Except as expressly admitted, Defendant denies the  
4     remaining allegations contained in Paragraph 19 of the TAC.

5             20.     Defendant admits that Plaintiffs purport to bring this action as a  
6     putative class action. Except as expressly admitted, Defendant denies the  
7     remaining allegations contained in Paragraph 20 of the TAC.

8             21.     Defendant denies the allegations contained in Paragraph 21 of the  
9     TAC.

10            22.     Defendant denies the allegations contained in Paragraph 22 of the  
11    TAC.

12            23.     Defendant denies the allegations contained in Paragraph 23 of the  
13    TAC.

14            24.     Defendant denies the allegations contained in Paragraph 24 of the  
15    TAC.

16            25.     Defendant admits that it received tens of thousands of telephone calls.  
17    Except as expressly admitted, Defendant denies the remaining allegations contained  
18    in Paragraph 25 of the TAC.

19            26.     Defendant denies the allegations contained in Paragraph 26 of the  
20    TAC.

21            27.     Defendant denies the allegations contained in Paragraph 27 of the  
22    TAC.

23            28.     Defendant denies the allegations contained in Paragraph 28 of the  
24    TAC.

25            29.     Defendant denies the allegations contained in Paragraph 29 of the  
26    TAC.

27            30.     Defendant denies the allegations contained in Paragraph 30 of the  
28    TAC.



1           39. Defendant denies the allegations contained in Paragraph 39 of the  
2 TAC.

3                                   **SECOND CAUSE OF ACTION**

4                           **Unlawful Recording of and Eavesdropping upon Confidential**  
5                           **Communications against Defendant**  
6                           **(Violation of California Penal Code § 632)**

7           40. Defendant incorporates by reference, as though fully set forth herein,  
8 Paragraphs 1 through 39 of this Answer.

9           41. Defendant admits that one telephone call made by Plaintiff Sarabia  
10 was routed to one of Defendant's call centers during the relevant period. Except as  
11 expressly admitted, Defendant lacks sufficient knowledge or information to admit  
12 or deny the allegations contained in Paragraph 41 of the TAC and, on that basis,  
13 denies the allegations.

14           42. Defendant admits that it records certain incoming calls for quality  
15 assurance purposes. Except as expressly admitted, Defendant denies the remaining  
16 allegations contained in Paragraph 42 of the TAC.

17           43. Defendant admits that it records certain incoming calls for quality  
18 assurance purposes. Except as expressly admitted, Defendant denies the remaining  
19 allegations contained in Paragraph 43 of the TAC.

20           44. Defendant admits that it records certain incoming calls for quality  
21 assurance purposes and that it did not provide an automated notice of recording to  
22 certain calls prior to July 18, 2012. Except as expressly admitted, Defendant denies  
23 the remaining allegations contained in Paragraph 44 of the TAC.

24           45. Defendant denies the allegations contained in Paragraph 45 of the  
25 TAC.

26           46. Defendant denies the allegations contained in Paragraph 46 of the  
27 TAC.

1                                   **PRAYER FOR RELIEF**

2           Defendant denies that Plaintiffs are entitled to any of the relief prayed for in  
3 the TAC.

4                                   **AFFIRMATIVE DEFENSES**

5                                   **FIRST AFFIRMATIVE DEFENSE**

6                                   (Failure to State Claim Upon Which Relief Can Be Granted)

7           47.   Neither the TAC nor any purported cause of action therein states facts  
8 sufficient to constitute a claim upon which relief can be granted against Defendant.

9                                   **SECOND AFFIRMATIVE DEFENSE**

10                                   (Statute of Limitations)

11           48.   The entire TAC, and all claims therein, are barred by the applicable  
12 statutes of limitation, including, but not limited to, California Code of Civil  
13 Procedure sections 312, 335.1, 337, 338, 340, and/or 343.

14                                   **THIRD AFFIRMATIVE DEFENSE**

15                                   (Lack of Standing)

16           49.   The TAC, and all causes of action therein, are barred in whole or in  
17 part because Plaintiffs and/or other putative class members lack standing to assert  
18 the claims alleged, and/or have not been injured or suffered any actual damages as a  
19 result of Defendant's alleged actions.

20                                   **FOURTH AFFIRMATIVE DEFENSE**

21                                   (Consent)

22           50.   Plaintiffs and the members of the purported class consented to the  
23 recording or monitoring of their telephone calls with Defendant.

24                                   **FIFTH AFFIRMATIVE DEFENSE**

25                                   (No Reasonable Expectation of Privacy)

26           51.   Plaintiffs and the members of the purported class had no reasonable  
27 expectation of privacy in their telephone calls with Defendant.



1                                   **SIXTH AFFIRMATIVE DEFENSE**

2                                   (Reasonableness and Good Faith)

3           52.     Defendant acted reasonably and in good faith at all times material  
4 herein, based on all relevant facts and circumstances known by Defendant at the  
5 time they so acted.

6                                   **SEVENTH AFFIRMATIVE DEFENSE**

7                                   (Applicable Statutes Ambiguous)

8           53.     The applicable statutes, including but not limited to those referenced in  
9 the TAC, are ambiguous and unclear, and do not impart any notice on Defendant or  
10 others similarly situated that its conduct would constitute violation of the statutes.

11                                  **EIGHTH AFFIRMATIVE DEFENSE**

12                                  (Preemption)

13           54.     Plaintiffs and the putative class members' claims are preempted in  
14 whole or in part by the Commerce Clause of the United States Constitution and  
15 other federal laws including, without limitation, the Communications Act of 1934,  
16 including the regulations promulgated thereunder, and the Omnibus Crime Control  
17 and Safe Streets Act of 1968.

18                                  **NINTH AFFIRMATIVE DEFENSE**

19                                  (Improper Class Action)

20           55.     To the extent Plaintiffs purport to certify a class, Plaintiffs' allegations  
21 do not give rise to class status as there is no typicality, numerosity, commonality,  
22 ascertainability or adequate representation present in this action. The class action is  
23 also not manageable or superior to individual actions.

24                                  **TENTH AFFIRMATIVE DEFENSE**

25                                  (Proximate Cause)

26           56.     The damages alleged by Plaintiffs and/or the putative class members  
27 were not proximately caused by any act or omission on the part of Defendant.  
28

1                                   **ELEVENTH AFFIRMATIVE DEFENSE**

2                                   (Limitation on Recoverable Damages)

3           57.   Plaintiffs and/or the putative class members' recovery of their alleged  
4 statutory damages are limited by the applicable statutory ceilings on recoverable  
5 damages. In addition, under Penal Code section 637.2, the maximum amount of  
6 statutory damages without proof of actual damages that can be recovered in this  
7 action is \$5,000.

8                                   **TWELFTH AFFIRMATIVE DEFENSE**

9                                   (Justification)

10          58.   At all relevant times, the acts or omissions of Defendant was legally  
11 justified and therefore Defendant cannot be liable for those acts or omissions.

12                                  **THIRTEENTH AFFIRMATIVE DEFENSE**

13                                  (Due Process)

14          59.   The application of Penal Code section 632.7 to Defendant violates due  
15 process because Defendant has no reasonable way of determining whether the  
16 person calling them is using a cordless or cellular telephone. In addition, it violates  
17 due process for California to regulate recording that takes place outside of its  
18 borders.

19                                  **FOURTEENTH AFFIRMATIVE DEFENSE**

20                                  (Uncertainty)

21          60.   The TAC and each cause of action therein is vague, ambiguous and  
22 uncertain.

23                                  **FIFTEENTH AFFIRMATIVE DEFENSE**

24                                  (Attorney's Fees Improper)

25          61.   Plaintiffs' TAC fails to state a claim for attorney's fees or set forth  
26 facts sufficient to support such a claim.



1 had the legal right to control, and such alleged violations were not proximately or  
2 otherwise caused by any act, omission, or other conduct of Defendant.

3 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

4 (Inapplicability of California Penal Code Sections 630 *et seq.*)

5 68. The provisions of California Penal Code sections 630, *et seq.*, are not  
6 applicable to the recording or monitoring of any telephone calls where the  
7 recording or monitoring took place outside the State of California.

8 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

9 (Waiver)

10 69. The TAC, and all purported causes of action contained therein, are  
11 barred by the doctrine of waiver, as a result of the acts, conduct, and omissions of  
12 Plaintiff and/or other putative class members, or others that are attributable to  
13 Plaintiff and/or other putative class members.

14 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

15 (Calls Not Answered On Cellular, Cordless, or Landline Telephone)

16 70. California Penal Code section 632.7 is not applicable to the calls at  
17 issue in this case because Defendant did not answer the calls using a cellular,  
18 cordless or landline telephone but instead received them on computers using Voice  
19 Over Internet Protocol (VOIP). Therefore the calls were not a “communication  
20 transmitted between two cellular radio telephones, a cellular radio telephone and a  
21 landline telephone, two cordless telephones, a cordless telephone and a landline  
22 telephone, or a cordless telephone and a cellular radio telephone[.]”

23 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

24 (Lack of Intent)

25 71. Defendant did not believe that the telephone calls at issue were  
26 confidential communications, and did not know that any particular call came from a  
27 cordless or cellular telephone. Therefore, Defendant did not intend to record  
28

1 confidential communications or communications made on cordless or cellular  
2 telephones, and did not violate California Penal Code section 632.7.

3 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

4 (Mistake)

5 72. The failure to provide required notices and/or violation of the law, if  
6 any, was the result of mistake.

7 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

8 (Right to Raise Other Defenses)

9 73. Plaintiffs and the putative class members have not set out their claims  
10 with sufficient particularity to permit Defendant to raise all appropriate affirmative  
11 defenses. Defendant has not knowingly or intentionally waived any applicable  
12 affirmative defenses, but Defendant reserves the right to assert and to rely upon  
13 additional affirmative defenses not stated here, including such other defenses as  
14 may become available or apparent during discovery of this action and reserve the  
15 right to amend this Answer to assert any such defenses.

16 **PRAYER**

17 WHEREFORE, Defendant prays for judgment as follows:

- 18 1. That Plaintiffs take nothing by their TAC;  
19 2. That judgment be entered in favor of Defendant and against Plaintiffs  
20 on all causes of action;  
21 3. That Defendant be awarded the costs of suit herein incurred; and  
22 4. That Defendant be awarded such other and further relief as the Court  
23 may deem appropriate.

24 Dated: July 9, 2015

**DLA PIPER LLP (US)**

25 By s/ Monica D. Scott

26 **PERRIE M. WEINER**

**EDWARD D. TOTINO**

27 **MONICA D. SCOTT**

Attorneys for Defendant

28 **SIX CONTINENTS HOTELS, INC.**